IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHONTE WATKINS, Plaintiff, v. VISION ACADEMY CHARTER SCHOOL Defendant.	CIVIL ACTION NO. 20-656

MEMORANDUM

Joyner, J. **July 23, 2020**

Presently before this Court are Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and to Compel Mediation and Arbitration, and Plaintiff's Memorandum of Law in Opposition thereof. For the reasons that follow, Defendant's Motion is denied without prejudice.

Factual Background

On February 4, 2020, Plaintiff Shonte Watkins filed an employment discrimination action against Defendant Vision Academy Charter School, her former employer, for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e *et seq.*, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) *et seq.*, the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 951 *et seq.* (Pl. Complaint – Civil Action, Doc. No. 1 §1.) Specifically, Plaintiff claims that

Defendant terminated her on the basis of her gender and pregnancy and in retaliation for Plaintiff's request for pregnancy-related leave under the FMLA. (Id.) Defendant brings the instant Motion to Dismiss and to Compel Mediation and Arbitration of Plaintiff's claims pursuant to an arbitration clause in Plaintiff's Employment Agreement. (Def. Vision Academy Charter School's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) and to Compel Mediation and Arbitration, Doc. No. 6.)

Plaintiff worked for Defendant as a Secretary. (Doc. No. 1 §14.) Upon accepting employment on or about July 18, 2017, Plaintiff executed an Employment Agreement containing a mediation and arbitration clause which requires that all claims relating to the Agreement be submitted to mediation and if necessary, arbitration. (Doc. No. 6 at 2). Plaintiff's employment was then "terminated on or about August 13, 2019 [sic][1]. . . ." (Doc. No. 1 § 23.)

The terms of the arbitration clause relevant to this motion are as follows:

> If there is any dispute between the parties regarding or related to this Agreement, that dispute must be first submitted to non-binding mediation before a mediator agreeable to both parties. . . . Any fees or costs incurred by a mediator shall be shared equally by the parties. If mediation fails, then either party may submit an

[1] This Court is inferring that Plaintiff was terminated on August 13, 2018, as that is the end of the employment term specified in the Employment Agreement. (Emp. Agmt. ¶ 2.)

> arbitration claim to AAA and binding arbitration before AAA shall be the sole and exclusive jurisdiction for any such dispute. . . . The fees and costs incurred by AAA and the AAA arbitrator shall be shared equally by the parties. The prevailing party in the arbitration shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs incurred by the prevailing party.

(Emp. Agmt. ¶ 13.)

In her Response, Plaintiff does not dispute entering into the Employment Agreement with Defendant. (See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and to Compel Mediation and Arbitration, Doc. No. 7.) Rather, she contends that (1) her claims do not fall within the scope of the agreement and (2) the arbitration clause is unconscionable, rendering it invalid and unenforceable. (Id. at 1.)

Analysis

Subject-Matter Jurisdiction

Subject-matter jurisdiction over Plaintiff's federal claims is proper under 28 U.S.C. § 1331. (Doc. No. 1 § 10.) This Court has supplemental jurisdiction over Plaintiff's state claims pursuant to 28 U.S.C. § 1367. (Id. § 11.)

Standard of Review

Section 2 of the Federal Arbitration Act ("FAA") provides that arbitration agreements "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, if a

valid agreement to arbitrate exists and the dispute falls within the scope of its terms, the Court must mandate arbitration. Id. The Third Circuit has set forth which standard Courts should apply when deciding whether to compel arbitration. See Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 773-74 (3d Cir. 2013). Which standard is appropriate turns on whether "the affirmative defense of arbitrability of claims is apparent on the face of a complaint or documents relied upon in the complaint." Id. (internal quotations omitted). If it is "apparent . . . that certain of a party's claims are subject to an enforceable arbitration clause," then Courts should apply the Rule 12(b)(6) standard. Id. at 776 (internal quotations omitted).

However, if "the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue," then the parties should engage in limited discovery regarding the question of arbitrability. Id. Once this limited discovery is complete, the Court may consider a renewed motion to compel arbitration, this time under a summary judgment standard. Id. In this instance, parties seeking to avoid arbitration can place the agreement to arbitrate in issue using general "applicable contract defenses, such as fraud, duress, or

unconscionability . . . ." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (U.S. 1996). Conclusory, self-serving affidavits are generally insufficient to meet the burden required; the affidavit must set forth specific facts that create a genuine issue of material fact. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009).

As a threshold issue, the Court must determine which standard applies to this instant motion. In Asberry-Jones v. Wells Fargo Bank, Nat'l Ass'n, 2019 WL 2077731 at *3 (E.D. Pa. May 10, 2019), the plaintiff's complaint did not refer to the arbitration agreement at issue. However, because the Court found the allegations to fall within the scope of the agreement's terms and the plaintiff did not challenge the agreement's validity, the Court chose to apply the Rule 12(b)(6) standard. Id,(noting the "purposes of the [Federal Arbitration] Act would be frustrated" if plaintiffs could avoid having their claims compelled to arbitration simply by failing to mention an applicable arbitration agreement in their complaints) (internal quotations omitted).

As in Asberry-Jones, the affirmative defense of arbitrability of Plaintiff's claims here is not apparent on the face of the Complaint or the documents relied upon in the Complaint. (See Doc. No. 1.) However, unlike the plaintiff in Asberry-Jones, Plaintiff has responded to Defendant's motion

with additional facts that place the agreement to arbitrate in issue. (See Doc. No. 7.) Plaintiff argues that the arbitration clause is unconscionable and thus unenforceable because, *inter alia*, it requires Plaintiff to split the costs and fees of both mediation and arbitration with the Defendant and to pay Defendant's attorney's fees should she be unsuccessful in the arbitral forum. (Doc. No. 7 at 9). In support of her challenge, Plaintiff submitted an affidavit regarding her financial status and inability to pay the required costs should the Court compel arbitration. (Dec. of Shonte Watkins, Doc. No. 7.1 ¶¶4-6.)

Though Plaintiff's affidavit is self-serving, it sets forth specific facts that create a genuine issue of material fact regarding the validity of the arbitration clause. For example, Plaintiff swore under oath that she "do[es] not possess the financial means to bear even half of the costs of mediation and arbitration, let alone Defendant's attorneys' fees and costs." (Id. ¶ 6.) After her employment ended, she "was unable to find work until in or about November 2019," she "did not receive unemployment benefits," and her current salary "was reduced to about $47,000 per year due to the ongoing pandemic." (Id. ¶¶4-5.) These allegations are sufficiently specific and uncontested by Defendant. Accordingly, Plaintiff's arguments regarding the unconscionability of the arbitration clause create a genuine

issue of fact as to the arbitrability of Plaintiff's claims. We thus find it appropriate that the parties should engage in limited discovery regarding the question of arbitrability. See, Guidotti, 716 F.3d at 776.

Determining the Scope of Limited Discovery

As the parties shall engage in limited discovery, the Court will now address the scope of that discovery. To determine whether an agreement to arbitrate is unconscionable, Courts apply state contract principles. Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221, 230 (3d Cir. 2012). Thus, in determining unconscionability, this Court uses principles of Pennsylvania law. Under Pennsylvania law, "a contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it." Salley v. Option One Mortg. Corp., 119. **(full citation)**

A series of opinions in this District have held that cost-sharing provisions unreasonably favor the party asserting them and are unconscionable where the costs and fees of arbitration are shown to be prohibitively expensive for plaintiffs. See Parker v. Briad Wenco, LLC, 2019 WL 2521537 at *4-5 (E.D. Pa. May 14, 2019); Clymer v. Jetro Cash and Carry Enterprises, Inc., 334 F. Supp. 3d 683, 692 (E.D. Pa. 2018); Giordano v. Pep

Boys—Manny, More & Jack, Inc., 2001 WL 484360 at *6 (E.D. Pa. Mar. 29, 2001). Such prohibitive costs "could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (U.S. 2000). The burden falls on the party seeking to avoid arbitration to show the likelihood of incurring such prohibitive costs. Id. at 92.

However, the party seeking to avoid arbitration cannot meet the burden required without engaging in discovery limited to the narrow issue of the estimated costs of arbitration and the claimant's ability to pay them. Blair v. Scott Specialty Glass, 283 F.3d 595, 609 (3d Cir. 2002). In Blair, the plaintiff had submitted an affidavit setting forth her limited financial capacity, claiming that she could not afford to pay the costs of arbitration. Id. at 608. However, she attached no documents supporting the facts and figures presented nor any information about the estimated costs of arbitration. Id. However, the Court found that limited discovery into these issues would allow the plaintiff the opportunity to prove that arbitration would deny her a forum to vindicate her statutory rights and allow the defendant the opportunity to prove that arbitration would not be prohibitively expensive. Id. at 610. Specifically, the Court noted that limited discovery into "the rates charged by the AAA

and the approximate length of similar arbitration proceedings should adequately establish the costs of arbitration." Id.

Like the plaintiff in Blair, Plaintiff has submitted an affidavit setting forth her limited financial capacity, claiming that she cannot afford to pay even half of the costs of mediation and arbitration. (Dec. of Shonte Watkins, Doc. No. 7.1.) Plaintiff additionally claims that she would be unable to afford Defendant's attorneys' fees should she be unsuccessful in the arbitral forum. Id. However, Plaintiff provides no documents supporting these assertions. See id. Thus, like in Blair, limited discovery is necessary. See Guidotti, 716 F.3d at 774; Blair, 283 F.3d at 610. Only then will the Court be able to determine whether the costs and fees Plaintiff would face in both mediation and arbitration would be so prohibitively expensive as to prevent her from vindicating her federal statutory rights.

As such, the Court will grant the parties thirty days to engage in limited discovery regarding the issue of arbitrability, specifically the estimated costs and fees associated with their specific mediation and arbitration, including Defendant's attorneys' fees, as well as Plaintiff's ability to pay them. Upon completion of the limited discovery, Defendant should submit a renewed motion to compel arbitration,

which will be reviewed by this Court under the summary judgment standard. See Guidotti, 716 F.3d at 776.

Conclusion

Defendant's Motion to Dismiss and to Compel Mediation and Arbitration is denied without prejudice. The parties are to engage in limited discovery regarding the issue of arbitrability. An appropriate order follows.